

A Pacific & Orient Insurance Co Bhd v Rusnah Abd Raop

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5-24-341 OF 2001
KANG HWEЕ GEE J
23 JUNE 2003

B

Civil Procedure — Injunction — Interlocutory injunction — Grounds to consider — Application for — Injunction to restrain the defendant from presenting a winding up petition — Debt arising from judgment sum awarded in motor accident claim — Whether recovery action and judgment necessary before presentation of winding up petition — Companies Act 1965 s 218(1)(e) — Road Transport Act 1987 s 96

C

The plaintiff, an insurance company, sought an interlocutory injunction to restrain the defendant from presenting a petition to wind it up on the ground that it was unable to pay its debt pursuant to s 218(1)(e) of the Companies Act 1965 ('the Act') of which a statutory demand under s 218(2)(a) had been served on the plaintiff.

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The injunction sought to restrain the defendant from filing in any court a petition to wind up the plaintiff until the defendant obtained a (recovery) judgment against the plaintiff from the court with respect to a judgment which the defendant had obtained in the sessions court and, in the alternative, from advertising, publishing and gazetting in any local newspaper and the Government Gazette any such winding up petition, until the defendant had obtained such (recovery) judgment against the plaintiff. The debt arose from a judgment sum obtained by the defendant at the sessions court pursuant to a motor accident claim against the owner and driver of a vehicle of which the plaintiff was the insurer.

E**F**

Held, dismissing the application:

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(1) Section 96 of the Road Transport Act 1987 imposes upon an insurer the obligation of paying to the person who obtains a judgment against an insured after a certificate of insurance has been duly delivered to the person by whom the policy is effected in respect of any third party risk covered under the policy (the insured). The insurer is obliged under s 96 to pay to persons entitled to the benefit of the judgment including costs and interest accrued there from. The insurer will only be able to avoid the payment where the requisite notice of the proceeding is not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability has been cancelled; and where the insurer has obtained a declaration from the court that the insurance is void or unenforceable (see p 120G-I).

H**I**

(2) None of the above-mentioned impairments applied to allow the plaintiff the liberty to avoid its statutory obligation on the policy in the instant case. Its obligation to pay the judgment sum to the defendant must under the circumstances be found to be absolute.

The judgment obtained from the sessions court being a monetary sum constituted a debt — due from the plaintiff by which the defendant may be able to recover by serving the statutory demand followed by a petition under s 218(1)(e) of the Act. The defendant need not institute a separate recovery action against the plaintiff and obtain judgment therefrom before proceeding to present a winding up petition. Applying the test in *Bryanston Finance Ltd v de Vries (No 2)* [1975] 1 All ER 25, it was clear that the intended petition was bona fide and if presented, was not bound to fail (see p 121A–D).

[Bahasa Malaysia summary]

Plaintif, sebuah syarikat insurans, telah memohon satu injunksi interlokutori untuk menghalang defendan daripada mengemukakan satu petisyen untuk menggulungnya atas alasan ia tidak mampu membayar hutangnya menurut s 218(1)(e) Akta Syarikat 1965 ('Akta tersebut') di mana satu tuntutan statutori di bawah s 218(2)(a) telah disampaikan ke atas plaintiff. Injunksi tersebut telah dipohon untuk menghalang defendan daripada memfailkan dalam mana-mana mahkamah satu petisyen untuk menggulungkan plaintiff sehingga defendan memperoleh penghakiman (pengembalian) terhadap plaintiff dari mahkamah berhubung penghakiman yang defendan telah perolehi dari mahkamah sesyen dan, secara alternatif, dari pengiklanan, penerbitan dan pewartaan dalam mana-mana akhbar tempatan dan Warta Kerajaan apa-apa petisyen penggulangan sedemikian, sehinggalah defendan memperoleh penghakiman (pengembalian) tersebut terhadap plaintiff. Hutang itu timbul daripada satu jumlah penghakiman yang diperolehi oleh defendan di mahkamah sesyen menurut satu tuntutan kemalangan motor terhadap pemilik dan pemandu sebuah kenderaan yang mana plaintiff adalah penanggung insurans.

Diputuskan, menolak permohonan tersebut:

- (1) Seksyen 96 Akta Pengangkutan Jalan 1987 mengenakan ke atas penanggung insurans satu obligasi untuk membayar kepada seseorang yang telah mendapat penghakiman terhadap pengambil insurans selepas satu sijil insurans disampaikan ke atas orang yang dinamakan dalam polisi tersebut berhubung risiko mana-mana pihak ketiga yang dilindungi di bawah polisi tersebut (pengambil insurans). Penanggung insurans mempunyai obligasi di bawah s 96 untuk membayar kepada mereka yang berhak mendapat faedah daripada penghakiman tersebut termasuklah kos dan faedah yang terakru. Penanggung insurans hanya boleh mengelakkan bayaran di mana hanya terdapat notis prosiding yang diperlukan tidak diberikan kepada penanggung insurans sebelum prosiding bermula; di mana terdapat satu penggantungan penghakiman sementara menunggu rayuan; di

- A** mana polisi insurans berhubung liabiliti telah dibatalkan; dan di mana penanggung insurans telah memperoleh satu deklarasi daripada mahkamah bahawa insurans tersebut adalah batal atau tidak berkuatkuasa (lihat ms 120G–I).
- B** (2) Tiada apa-apa kecacatan yang tersebut di atas memberikan plaintiff peluang untuk mengelakkan diri dari obligasi statutorinya berhubung polisi tersebut. Obligasinya untuk membayar jumlah penghakiman tersebut kepada defendan perlulah di dalam keadaan sedemikian didapati mutlak. Ia adalah jelas bahawa penghakiman yang diperolehi daripada mahkamah sesyen yang merupakan jumlah wang yang membentuk suatu hutang — yang perlu dibayar oleh plaintiff di mana defendan mungkin dapat kembali dengan menyampaikan satu tuntutan statutori diikuti oleh satu petisyen di bawah s 218(1)(e) Akta tersebut. Defendan tidak perlu memulakan satu tindakan pengembalian (recovery action) yang berasingan terhadap plaintiff dan mendapat penghakiman di situ sebelum prosiding tersebut untuk mengemukakan satu petisyen penggulangan. Dengan menggunakan ujian dalam *Bryanston Finance Ltd v de Vries (No 2)* [1975] 1 All ER 25, ia adalah jelas bahawa petisyen yang diniatkan adalah bona fide dan jika dikemukakan, ia tidak mungkin gagal (lihat ms 121A–D).]
- C**
- D**

E Notes

For cases on interlocutory injunctions, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2118–2235.

Cases referred to

- F** *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (refd)
Bryanston Finance Ltd v de Vries (No 2) [1976] 1 All ER 25 (refd)
Charles Forte Investments Ltd v Amanda [1963] 2 All ER 940 (refd)
Imbangan Utama Sdn Bhd v Lotan Engineering Sdn Bhd [2002] 2 MLJ 313 (refd)
- G** *Keet Gerald Francis Noel John Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 (refd)
Ng Ah Kway v Tai Kit Enterprise Sdn Bhd [1986] 1 MLJ 58 (refd)

Legislation referred to

- H** Companies Act 1965 s 218(1)(e), (2)(a)
 Companies Act 1948 [UK] s 222(f)
 Road Transport Act 1987 s 96

Elango Manivel (Zaid Ibrahim & Co) for the plaintiff.

Watson Peters (S Kirushnaveni with him) (Watson Peters & Mohd Fuad) for the defendant.

I

Kang Hwee Gee J: By this originating summons, the plaintiff, an insurance company, seeks an interlocutory injunction to restrain the

defendant from presenting a petition to wind it up on the ground that it was unable to pay its debt pursuant to s 218(1)(e) of the Companies Act 1965 ('the Act') of which a statutory demand under s 218(2)(a) of the Act had been served on the plaintiff.

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Specifically the summons prays for the following orders:

That the defendant be restrained by an injunction from filing in any court a petition to wind up the plaintiff until the defendant obtained a judgment against the plaintiff from the court with respect to the judgment which the defendant had obtained in the Kuala Lumpur Sessions Court Summons No 53-1417 of 1996 and, in the alternative, from advertising, publishing and gazetting in any local newspaper and the Government Gazette any such winding up petition, until the defendant had obtained such judgment against the plaintiff.

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The debt arose from a judgment sum obtained by the defendant at the sessions court pursuant to a motor accident claim against the owner and driver of a vehicle of which the plaintiff was the insurer. Under s 96 of the Road Transport Act 1987, the plaintiff as the insurer of that vehicle was obliged to satisfy any judgment obtained against the insured in respect of third party risks. The section reads as follows:

D

Duty of insurers to satisfy judgements against persons insured in respect of third party risks

(1) If, after a certificate of insurance has been delivered under subsection (4) of section 91 to the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 91 (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgement any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgements.

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(2) No sum shall be payable by an insurer under subsection (1) —

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(a) in respect of any judgement, unless before or within seven days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the proceedings;

(b) in respect of any judgement, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either —

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(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

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(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the

- A** cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or
- (iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.
- B**

- (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable:

- C** Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgement obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.
- D**

- (4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

- E** (5) In this section, the expression 'material' means of such a nature as to influence the judgement of a prudent insurer in determining whether he will take the risks, and if so at what premium and on what conditions, and the expression 'liability covered by the terms of the policy' means a liability but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

- F** (6) In this Part, reference to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.
- G**

At the sessions court, the plaintiff stepped into the shoes of the insured to defend the defendant's claim when in the end the aggregate sum of RM71,505.78 in special and general damages was awarded to the defendant. The plaintiff appealed against the decision of the sessions court to the High Court which had dismissed the appeal. An application for leave to appeal to the Court of Appeal is now pending, but no stay of execution had been applied for.

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- I** The application was originally made ex parte. But as it was clear that there was no exigency to hear the application on an ex parte basis, the plaintiff was ordered to serve the application on the defendant who subsequently came to oppose it.

The ground in support of the application appears in the supporting affidavit of its Claims Manager, Pauline Jasuntha d/o Bernard Victor.

The plaintiff contends that the initiation of the winding up proceeding against it is an abuse of the process as all that the defendant had is a judgment against the insured and not a judgment against the plaintiff. The defendant should first commence a proceeding against the plaintiff to recover the judgment sum he had obtained before proceeding to serve the statutory demand on the plaintiff to claim the said sum. The presumption under s 218 of the Act that the plaintiff was unable to pay its debt does not arise. The petition, if allowed to proceed, will cause its bank accounts to be frozen, cripple its insurance business and stifle its business opportunities. The plaintiff denies that it is unable to pay its debt. Had that been the case, its supervisory authority Bank Negara would have intervened.

The scope of s 218(1)(e) of the Companies Act 1965

To wind up a company under s 218(1)(e) of the Act, a petitioning creditor need not have in his hand a judgment debt as he would in a petition for the bankruptcy of a natural person.

The extent to which the court is prepared to accept a claim as a debt due to the petitioner under s 218(1)(e) of the Act was aptly described by Vincent Ng J in *Imbangan Utama Sdn Bhd v Lotan Engineering Sdn Bhd* [2002] 2 MLJ 313 in the following words at p 317:

I would begin by stating the guiding principles governing such petitions. A winding up court should not allow itself to be used by an intended litigant as a machinery for trying a common law action or as a short-cut alternative to suing under common law on an alleged debt due (see *Re Imperial Guardian Life Assurance Society* [1869] (Vol IX) p 447 at 450). Yet, if it is crystal clear that such debt is due, for example, upon clear uncontroverted evidence or acknowledgement of indebtedness on a quantified or liquidated sum, it would waste the civil courts' valuable time to require that the claimant/petitioner first proceed under common law and secure judgment on the debt before proceeding to petition to wind up the company. Indeed, such an approach would in effect render nugatory and purposeless, s 218(1)(e) read in conjunction with s 218(2)(a) of the Act.

Under s 218(2)(a) of the Act, if a creditor to whom the company is indebted of a sum exceeding RM500 neglected to pay the said sum within three weeks of being served with a demand for the debt, it shall be deemed that the company is unable to pay its debt.

The service of the statutory demand has the effect of putting the onus on the company to rebut the presumption that it was unable to pay its debt, leaving the determination of whether or not the sum claimed was really owed entirely in the hands of the petitioner at least up to the stage of the institution of the winding up petition — by which time considerable damage would have been suffered by the company in consequence. To protect itself, a company bona fide disputing the debt claimed is perfectly entitled to take the pre-emptive step of restraining the petitioner from filing the petition for the effect that a winding up petition may bring to a company is obvious. As Shankar J (as he then was, quoting from *Buckley on the Companies Act 1948*

A (13th Ed)), said in *Ng Ah Kway v Tai Kit Enterprise Sdn Bhd* [1986] 1 MLJ 58 at p 64:

B Great damage may obviously be done to a solvent company by a winding up petition presented by an unreasonable creditor, whose debt the company are able and willing to pay if established, but to whom they bona fide believe they are not indebted. In such a case, on a writ issued by the company, an injunction will be granted to restrain the creditor presenting the petition.

The tests

C Typically, the test that one would apply to determine whether an interlocutory injunction should be granted is to ask the question devised by Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 and reformulated by Gopal Sri Ram JCA in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 and summarized in the report as follows (at pp 195–196):

D A judge hearing an application for an interlocutory injunction should:

- E (1) ask himself whether the totality of the facts presented before him disclosed a bone fide serious issue to be tried. He must refrain from making any determination on the merits of the claim or any defence to it and identify with precision the issues raised and decide whether they are serious enough to merit a trial. If he finds that no serious question is disclosed, the relief should be refused. If, however, he finds that there are serious questions to be tried, he should move on to the next step of his inquiry;
- F (2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. He must take into account all relevant matters, including the practical realities of the case before him and weigh the harm the injunction would produce by its grant, against the harm that would result from its refusal; and
- G (3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and to maintain the status quo. It is a judicial discretion capable of correction on appeal. A judge should briefly set out in his judgment the several factors that weighed in his mind when arriving at his conclusion.

H A more refined approach was adopted by the English Court of Appeal in *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25, wherein the *American Cyanamid* procedure was found to be inappropriate when considering whether to grant an order to restrain a winding up petition from being presented against a company.

I In that case, the petitioner de Vries, a minor shareholder of Bryanstone Finance was dissatisfied with the management of the company. He requested for information with respect to certain entries in the company's account but failed to receive any. He then threatened to petition the winding up of the company on the 'just and equitable' ground under s 222(f) of the Companies Act 1948 thereby provoking the company to

apply for an injunction to restrain him from presenting the petition on the ground of its failure to answer any of his questions relating to the accounts or on any ground connected therewith.

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The company failed to obtain the order sought. It was held that as the right to petition the winding up of a company was a right conferred by statute, a restraining order could only be issued if on available evidence it could be said that the presentation of a petition would *prima facie* be an abuse of the process. The court would not interfere with what would be a legitimate petition. Where *prima facie* such evidence shows that the defendant's allegation might lead to a winding up order, the injunctive relief would be refused.

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Preferring the test laid down in the earlier Court of Appeal case of *Charles Forte Investments Ltd v Amanda* [1963] 2 All ER 940 over *American Cyanamid*, this was what Stephenson LJ said at p 37g of the report:

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This is not 'an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right', but to restrain a defendant from exercising his legal right to present a petition. So Lord Diplock's words in the *American Cyanamid* case which Buckley LJ has quoted do not apply to such application as this. Their Lordships (in the *American Cyanamid* case) do not seem to have had this sort of injunction in mind and they cannot have overruled *Forte's* case by implication. *Forte's* case still binds us to hold that *unless the plaintiff company can prove that a petition is bound to fail — or perhaps that there is a suitable alternative remedy to a petition — Mr de Vires cannot be restrained, even temporarily from presenting it.* (Emphasis added).

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There is a difference between the two tests. Whereas *Bryanstone Finance* imposes upon the company the more onerous task of proving that the petition if presented is bound to fail, *American Cyanamid* only requires it to show that there is a serious question to be tried to carry it through to the next neutral stage of having the equities of convenience of the parties determined. The plaintiff would succeed if the balance of convenience tips in his favor.

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The obligation of the insurer under s 96 of the Road Transport Act 1987

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Section 96, it is clear, imposed upon the insurer the obligation of paying to the person who had obtained a judgment against the insured after a certificate of insurance had been duly delivered to the person by whom the policy is effected in respect of any third party risk covered under the policy.

It is also clear that the insurer is obliged under s 96 to pay to persons entitled to the benefit of the judgment including costs and interest accrued there from. The insurer would only be able to avoid the payment only under the circumstances and conditions mentioned in sub-ss 2 and 3 of s 96, that is to say, where the requisite notice of the proceeding was not given to the insurer before the commencement of the proceedings; where there is a stay of the judgment pending appeal; where the policy of insurance respecting the liability had been cancelled; and where the insurer had obtained a declaration from the court that the insurance was void or unenforceable.

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A None of the above-mentioned impairments apply to allow the plaintiff insurer in the instant case the liberty to avoid his statutory obligation on the policy. Its obligation to pay the judgment sum to the defendant must under the circumstances be found to be absolute.

B The word 'debt' has not been legally defined under the Companies Act 1965. But the *New Oxford Thesaurus of English* defined 'debt' as:

bill, account, tally, financial obligation, outstanding payment, amount due, money arising, dues, arrears, charges;

C Applying the plain thesaurus meaning to the word, it is clear that the judgment obtained from the sessions court being a monetary sum constitutes a debt — due from the plaintiff by which the defendant may be able to recover by serving the statutory demand followed by a petition under s 218(1)(e) of the Act. The plaintiff's submission that the defendant must first institute a separate recovery action against the plaintiff and obtained judgment there from before proceeding to present a winding up petition is therefore untenable.

D *Applying the tests — whether an interlocutory injunction should issue*

Applying the more specific test in *Bryanstone Finance*, it is clear that the intended petition is bona fide and if presented, is not bound to fail.

E But even if one were to apply the general test in *Keet Gerald Francis*, the plaintiff would not have succeeded — for it is clear that the facts as presented does not disclose a bona fide question to be tried.

The order

F The application is dismissed with costs.
Application dismissed.

Reported by Peter Ling

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